Stars upon Thars: Evaluating the Discriminatory Impact of ABA Standard 405(c) "Tenure-Like" Security of Position

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Introduction

This brief Article[1] relates to the institutional discrimination against women within the legal academy. More specifically, this Article addresses the potential for exploitation of law faculty members who hold American Bar Association (ABA) Accreditation Standard 405(c) status and the likelihood that such exploitation will have a disparate, discriminatory impact on a predominantly female cohort of law faculty.

ABA Standard 405(c) applies specifically to clinical law faculties[2] and provides the standard for the status held by many legal writing faculties.[3] It reads:

> A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members. However, this Standard does not preclude a limited number of fixed, short-term appointments in a clinical program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.[4]

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1. The title of this Article is inspired by the Dr. Seuss story, *The Sneetches*. DR. SEUSS, *The Sneetches*, *in* THE SNEETCHES AND OTHER STORIES 1, 11 (1961).

2. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. Standard 405(c) (AM. BAR ASS'N 2015).

3. ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., REPORT OF THE ANNUAL LEGAL WRITING SURVEY 63 (2013), http://www.lwionline.org/uploads/FileUpload/2013SurveyReportfinal.pdf (question 65).

4. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. Standard 405(c) (AM. BAR ASS'N 2015).

The security of position afforded to 405(c) contractual law faculty members, defined as "reasonably similar to tenure,"[5] is somewhat vague and largely untested. This ambiguity provides an opportunity for law schools undergoing financial strain to terminate contractual legal writing faculty members without providing adequate, tenure-like protections. Augmenting this problem is the fact that faculty members who hold 405(c) status represent an overwhelmingly female cohort of faculty,[6] resulting in a discriminatory and disparate impact on female members of the academy.

This Article first provides statistics to demonstrate that faculty members who hold tenure-track and tenured positions are more likely to be male, whereas faculty members who hold contractual positions with substandard security of position are more likely to be female.[7] This Article then explores the type of security of position rights and processes that should apply to 405(c) contractual faculty members by examining the American Association of University Professors (AAUP) guidelines commonly referenced for tenured positions.[8] Next, this Article considers whether the distinction between the security of position afforded to tenure-track and tenured faculty members, who are predominantly male, and the security of position afforded to contractual faculty members, who are predominantly female, can be reasonably defended on the basis of merit, ultimately

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5. *Id.*

6. *See* ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., *supra* note 3, at 68 (question 71(b)) (showing that 73% of legal writing faculty members are women). Many of the resources cited in this Article pertain to legal writing faculty members, as the impact of the Standards on this constituency has been widely examined. However, the importance of protecting the rights of 405(c) faculty members is not limited to legal writing professors, since a significant number of clinical faculty members are women. *See* Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 UMKC L. REV. 293, 334 tbl.1A (2004). In addition, female clinicians are more likely to have 405(c) status than their male counterparts. *See* Marina Angel, *The Glass Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure*, 50 J. LEGAL EDUC. 1, 4 (2000). According to one study, approximately 41% of tenured and tenure-track clinician positions were held by female faculty members, and 59% were held by male faculty members. *Id.* In contrast, approximately 57% of 405(c) clinician positions were held by women, whereas 43% were held by men. *Id.* Finally, for clinician positions that were not tenured, tenure-track or 405(c), women held approximately 61% of these positions, whereas men held 39%. *Id.* These statistics demonstrate the importance of protecting faculty with 405(c) status, since faculty who hold these positions are predominantly female.

7. *See infra* Part I.

8. *See infra* Part II.

concluding that, in most cases, it cannot.[9] Finally, this Article identifies some of the discriminatory consequences the ABA Standards can have on female students and professors—consequences that will be compounded if law schools fail to provide adequate, tenure-like protections to contractual faculty members.[10] This Article concludes with a challenge to the academy to closely monitor discrimination against female law faculty members due to law schools' failure to afford contractual law professors with security of position that is *actually* reasonably similar to tenure.[11]

I. The Sorting Process: Men and Women in the Legal Academy

According to the Association of American Law Schools' (AALS) *Statistical Report on Law Faculty*, during the 2008–2009 school year, 62.2% of law school faculty members were male, whereas 37.3% were female.[12] In terms of job security, men held approximately 70% of tenure or tenure-track appointments.[13] Conversely, as of 2013, approximately 73% of legal writing faculty members were women.[14] While some legal writing faculty members are tenured or on tenure track, the majority hold positions with ABA 405(c) or 405(d) status.[15]

These statistics demonstrate that legal writing faculty members—who are typically women—are relegated to less secure positions.[16] Moreover, in the recent economic climate, security of

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9. *See infra* Part III.

10. *See infra* Part IV.

11. *See infra* Part V.

12. PATI ABDULLINA, ASS'N OF AM. LAW SCHS., STATISTICAL REPORT ON LAW FACULTY 2008–2009, at 10 (2009).

13. *Id.* at 24.

14. ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., *supra* note 3, at 68 (question 71(b)). As to why that is the case, Kathryn Stanchi and Jan Levine observed: "The appearance of a cadre of low-pay, low-status positions in skills courses flowed from two major events in the history of American law schools: the sharp rise in general law school enrollment in the 1970s and early 1980s and the influx of women into law schools in the mid-1970s." Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 BERKELEY WOMEN'S L.J. 3, 7 (2001).

15. ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., *supra* note 3, at 63 (question 65).

16. The situation is even more painful and precarious for women of color who teach legal writing. Lorraine K. Bannai acknowledged that "[a]t the same time that their experiences are shaped by their gender and race, women of color who teach Legal Writing within the legal academy [are] also subject to an academic hierarchy that diminishes them because of what they teach." Lorraine K. Bannai, *Challenged X 3: The Stories of Women of Color Who Teach Legal Writing*, 29 BERKELEY J. GENDER L. & JUST. 275, 278 (2014). In addition, "the ways in which

position for legal writing faculty members may be more tenuous than the language of the Standards suggests it should be.[17] ABA Standard 405(d), applicable to legal writing faculties, merely affords the security necessary to "attract and retain a faculty" and to "safeguard academic freedom."[18] ABA Standard 405(c), which applies specifically to clinical law faculty members, as well as to many legal writing faculty members,[19] requires that covered professors be afforded "a form of security of position *reasonably similar to tenure.*"[20] An Interpretation to this Standard clarifies that "[a] form of security of position reasonably similar to tenure includes a separate tenure track or a program of renewable long-term contracts" and that the phrase "'long-term contract' means at least a five-year contract that is *presumptively renewable.*"[21]

II. Security of Position: Rights and Processes

Ostensibly, tenure-like 405(c) job security should require a law school that chooses to terminate professors to provide 405(c) faculty members with a type of process *similar* to that afforded to tenured faculty members. The termination of a tenured faculty member not involving cause would typically require a relatively rigorous showing of financial strain.[22] For example, the AAUP

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race affects their experiences may become invisible in the dialogue about status and gender issues concerning Legal Writing faculty." *Id.* at 279. Bannai showed that the triple bias against women of color in legal writing presents a complex and complicated problem, and she noted that "conflating treatment based on gender and status with treatment based on race fails to recognize the profound ways in which marginalization based on race is different from that based on gender and status." *Id.* As Teri McMurtry-Chubb explained:

> In general, minority women in tenure-track positions enter the academy at lower ranks than their male counterparts and are often given low-status teaching assignments, specifically in legal writing. If women of color face this type of discrimination in tenure-track positions, positions that offer the opportunity of job security and academic freedom, then what possible long-term professional benefit could they derive from employment solely in [Legal Research and Writing] programs (tenure-track or non-tenure-track), which languish at the edges of the so-called legitimate academy?

Teri A. McMurtry-Chubb, *Writing at the Master's Table: Reflections on Theft, Criminality, and Otherness in the Legal Writing Profession*, 2 DREXEL L. REV. 41, 46 (2009).

17. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. Interpretation 405-6 (AM. BAR ASS'N 2015).

18. *Id.* at Standard 405(d).

19. *See* Angel, *supra* note 6, at 4–7.

20. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. Standard 405(c) (AM. BAR ASS'N 2015) (emphasis added).

21. *Id.* at Interpretation 405-6 (emphasis added).

22. *See, e.g.*, RECOMMENDED INSTITUTIONAL REGULATIONS ON ACAD. FREEDOM & TENURE, at Regulation 4(c) (AM. ASS'N OF UNIV. PROFESSORS 2014) (discussing the "extraordinary circumstances" necessary for termination of a tenured faculty

defines a bona fide financial exigency as "a severe financial crisis that fundamentally compromises the academic integrity of the institution as a whole and that cannot be alleviated by less drastic means."[23]

In the case of termination for financial exigency, AAUP guidelines require significant faculty-member participation in the decision-making process,[24] including involvement of and equitable processes for affected faculty members.[25] AAUP guidelines require the institution to demonstrate that it made reasonable efforts to place the affected faculty member in another suitable position,[26] and they generally prohibit institutions from simultaneously making new appointments.[27]

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member).

23. *Id.* at Regulation 4(c)(1).

24. The guidelines state:

> As a first step, there should be an elected faculty governance body, or a body designated by a collective bargaining agreement, that participates in the decision that a condition of financial exigency exists or is imminent and that all feasible alternatives to termination of appointments have been pursued, including expenditure of one-time money or reserves as bridge funding, furloughs, pay cuts, deferred-compensation plans, early-retirement packages, deferral of nonessential capital expenditures, and cuts to noneducational programs and services, including expenses for administration.

Id. Moreover, "[b]efore any proposals for program discontinuance on grounds of financial exigency are made, the faculty or an appropriate faculty body will have opportunity to render an assessment in writing of the institution's financial condition." *Id.* at Regulation 4(c)(2). This includes access to "at least five years of audited financial statements, current and following-year budgets, and detailed cash-flow estimates for future years," *id.* at Regulation 4(c)(2)(i), and "detailed program, department, and administrative-unit budgets," *id.* at Regulation 4(c)(2)(ii).

25. *Id.* at Regulation 4(c)(iii) ("Faculty members in a program being considered for discontinuance because of financial exigency will promptly be informed of this activity in writing and provided at least thirty days in which to respond to it."). Affected faculty members also have a right to a hearing to contest the action:

The issues in this hearing may include the following:

> (i) The existence and extent of the condition of financial exigency. The burden will rest on the administration to prove the existence and extent of the condition. The findings of a faculty committee in a previous proceeding involving the same issue may be introduced.
>
> (ii) The validity of the educational judgments and the criteria for identification for termination; but the recommendations of a faculty body on these matters will be considered presumptively valid.
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> (iii) Whether the criteria are being properly applied in the individual case.

Id. at Regulation 4(c)(3).

26. *Id.* at Regulation 4(c)(5).

27. *Id.* at Regulation 4(c)(4) ("If the institution, because of financial exigency, terminates appointments, it will not at the same time make new appointments, except in extraordinary circumstances where a serious distortion in the academic program would otherwise result."). Institutions are further prohibited from

In the case of programmatic reductions, AAUP guidelines require an institution to demonstrate that the decision to eliminate the faculty member was based on educational considerations.[28] "'Educational considerations' do not include cyclical or temporary variations in enrollment. They must reflect long-range judgments that the educational mission of the institution as a whole will be enhanced by the discontinuance."[29] Faculty members must be given an opportunity to participate in the decision,[30] and those affected are protected by equitable processes such as notice,[31] full consideration for an alternative placement,[32] and a "right to a full hearing before a faculty committee."[33] While these are guidelines recommended for the protection of tenured faculty members, they also identify the rights and processes for tenure security of position; therefore, they provide a template for the type of rights and processes reasonably similar to tenure.

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terminating tenured faculty members in favor of retaining non-tenured faculty members. *Id.* ("[A] faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure, except in extraordinary circumstances where a serious distortion of the academic program would otherwise result.").

28. *Id.* at Regulation 4(d).

29. *Id.* at Regulation 4(d)(1).

30. *Id.* ("The decision to discontinue formally a program or department of instruction will be based essentially upon educational considerations, as determined primarily by the faculty as a whole or an appropriate committee thereof.").

31. *Id.* at Regulation 4(d)(2) ("Faculty members in a program being considered for discontinuance for educational considerations will promptly be informed of this activity in writing and provided at least thirty days in which to respond to it.").

32. *Id.* at Regulation 4(d)(3). The guidelines explain:

> Before the administration issues notice to a faculty member of its intention to terminate an appointment because of formal discontinuance of a program or department of instruction, the institution will make every effort to place the faculty member concerned in another suitable position. If placement in another position would be facilitated by a reasonable period of training, financial and other support for such training will be proffered. If no position is available within the institution, with or without retraining, the faculty member's appointment then may be terminated, but only with provision for severance salary equitably adjusted to the faculty member's length of past and potential service, an amount which may well exceed but not be less than the amount prescribed in Regulation 8.

Id. The guidelines emphasize that "[w]hen an institution proposes to discontinue a program or department of instruction based essentially on educational considerations, it should plan to bear the costs of relocating, training, or otherwise compensating faculty members adversely affected." *Id.*

33. *Id.* at Regulation 4(d)(4).

III. The Defense of Security of Position Distinctions (or the Lack Thereof)

As noted, ABA Standard 405(c) requires law schools to provide contractual faculty members "a form of security of position *reasonably similar to tenure*."[34] In practice, however, institutions undergoing financial strain may not provide protections to contractual faculty members that are actually similar to those afforded tenured faculty members. Indeed, because the "reasonably similar" quality of the security afforded to contractual faculty members is unclear, and in many ways untested, the job-security hierarchy allows for the discriminatory termination of a predominantly female cohort of faculty members.[35] By contrast, little doubt exists in the academy about the substantive and procedural job security enjoyed by tenured and tenure-track faculty members, who are predominantly men.[36]

In most cases, the hierarchy cannot reasonably be defended on the basis of merit. Many, if not most, legal writing faculty members produce scholarship[37] and perform service.[38] Further, legal writing faculty members often have academic credentials equal to their tenure-line peers.[39] The teaching of legal writing

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34. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. Standard 405(c) (AM. BAR ASS'N 2015) (emphasis added).

35. *See supra* Part I.

36. *See supra* Part I.

37. ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., *supra* note 3, at 81 (question 81); *see also* Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 MARQ. L. REV. 887, 887–88 n.4 (2002) (discussing the emergence of legal writing scholarship); Terrill Pollman & Linda H. Edwards, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy*, 11 LEGAL WRITING J. LEGAL WRITING INST. 3 bibliog. (2005) (listing the scholarly works of nearly 300 legal writing professionals).

38. ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., *supra* note 3, at 83 (question 83).

39. Susan P. Liemer & Hollee S. Temple, *Did Your Legal Writing Professor Go to Harvard?: The Credentials of Legal Writing Faculty at Hiring Time*, 46 U. LOUISVILLE L. REV. 383, 418–25 (2008) (presenting the study's findings on legal writing professionals' credentials). Liemer and Temple demonstrated that "many legal writing professors without tenure-line appointments have credentials equal to many professors with doctrinal, tenure-line appointments" and questioned why this discrepancy exists. *Id.* at 425; *see also* Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117, 157 (1997) ("Although law schools seem less concerned about their [Legal Research and Writing] applicants having graduated from an elite law school, this does not mean that [applicants] do not need outstanding academic credentials. Usually they do."). *But see* Dan Subotnik, *Do Law Schools Mistreat Women Faculty? Or, Who's Afraid of Virginia Woolf?*, 44 AKRON L. REV. 867, 879 (2011) ("[T]he central weakness in Liemer and Temple's argument is that their study of the legal education of law teaching candidates is not sufficiently focused at the micro level."). Subotnik argued: "[W]hat Liemer and Temple need to do to nail down the case of bias is to

professors is no less intellectual than the teaching of casebook faculty members.[40] In fact, the analytical and writing skills practiced and reinforced in a legal writing course provide the foundation for successful communication and performance in both law school and legal practice. As Kathryn M. Stanchi observed,

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show that at a variety of schools the credentials of legal writing professors and tenure-track faculty are indistinguishable, and that when tenure-track jobs are available, women are shunted into legal writing." *Id.* However, there *are* compelling illustrations of just this phenomenon in the current conditions for many female legal writing faculty members across the country—faculty members have academic credentials and records of service and scholarship that are competitive with their doctrinal peers, but they nonetheless have substandard security of position. The fact that these (predominantly female) faculty members teach legal writing cannot justify this disparate and discriminatory treatment. *See* Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 263 (1997). In their 1997 survey, Merritt and Reskin revealed:

> Being female significantly increased the likelihood of teaching legal writing, trial or appellate advocacy, a clinical course, or another skills offering. *Even when men and women possessed the same academic credentials and work experience, women were significantly more likely to teach one of these low-status courses*. Once again, neither race nor the sex-race interaction exerted a significant influence on this type of teaching assignment. Both [W]hite women and women of color were significantly more likely than [W]hite or minority men with similar credentials to teach skills courses, an unfortunate result given the disfavored status of these subjects.

Id. (emphasis added).

40. Indeed, casebook faculty members who argue that they teach "doctrine" (in contrast to legal writing faculty members who teach "skills") fail to acknowledge that the teaching of both doctrine and legal reasoning is inherent in legal writing instruction. *See* Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99, 135 (2009) [hereinafter McGinley, *Reproducing Gender*]. McGinley cautioned that "[t]here is a serious question, however, as to whether the teaching performed by legal writing faculty is necessarily less intellectual or whether . . . it has been defined as less intellectual because it involves teaching styles and requirements that are gendered female." *Id.* She explained that "the work of the legal writing professor may not necessarily require a deep grasp of a substantive subject matter, but, when combined with research and publication, it has the capacity to involve a *deeper understanding of procedure and pedagogy* than that required for teaching doctrinal classes." *Id.* (emphasis added). McGinley concluded: "[T]he ideal legal writing teacher's work, when compared to the ideal doctrinal teacher's work, is equally as intellectual. It may also be that the judgment of the legal writing teaching as less intellectual is based on the gender of the job—female." *Id.* Finally, Kristen Konrad Robbins argued:

> [W]e need to say it like it is. Not just in law review articles but also to ourselves, our colleagues, doctrinal faculty, deans, alumni, and students: we are discriminated against because we are perceived as women who teach an intellectually inferior and unworthy subject. This is absurd, outrageous, and unacceptable. We teach a complex and sophisticated art form that combines the acquisition of knowledge—the law itself—*and* its application—persuasive technique.

Kristen Konrad Robbins, *Philosophy v. Rhetoric in Legal Education: Understanding the Schism Between Doctrinal and Legal Writing Faculty*, 3 J. ASS'N LEGAL WRITING DIRECTORS 108, 126 (2006).

> [t]hose who dismiss teaching writing as easy or unintellectual never . . . seem to even try to explain why (much less provide any evidence that) teaching torts or criminal law to first year law students is so difficult that only the most erudite professor can accomplish it, and why teaching a writing assignment involving an issue of tort law is somehow a far lesser challenge. Would a torts professor who taught torts through a series of torts-related writing assignments be less worthy of the higher rank than a doctrinal professor who relied on an end-of-semester examination? Also never questioned is the common statement of doctrinal teachers that they also do not teach primarily doctrine, but actually teach "thinking like a lawyer," which sounds a lot like what legal writing and clinical professors do. Why is this common pedagogical ground not a basis for equality?[41]

The doctrine versus skills dichotomy "operates as a term of exclusion that cements one of legal education's most harmful hierarchies,"[42] and is essentially a false one. As Lucille A. Jewel explained, "[l]egal writing professors teach analytical skills in the context of substantive law, incorporating civil procedure, modes of legal reasoning, common law rule synthesis, statutory rule construction, policy arguments, and professional ethics."[43] Legal

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41. Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467, 480–81 (2004).

42. Lucille A. Jewel, *The Doctrine of Legal Writing—Book Review of Linda H. Edward's* Readings in Persuasion: Briefs that Changed the World, 1 SAVANNAH L. REV. 45, 50 (2014); *see also* Linda H. Edwards, *Legal Writing: A Doctrinal Course*, 1 SAVANNAH L. REV. 1 (2014) (exploring the importance of recognizing the doctrine of legal writing). Edwards noted that doctrine

> defines what counts as disciplinary knowledge, . . . creates the shared language necessary to continue the exploration of that knowledge[,] . . . substantively impacts debates within the discipline[,] . . . privileges the positions commonly accepted by the inherited doctrine and requires other ideas to justify themselves at a higher standard[,] . . . [and] steers scholars toward exploration of certain subjects and away from others.

Id. at 10–11. Edwards acknowledged the current breadth and potential future of legal-writing doctrine and cautioned that if the subject matter of legal writing "is perceived, *inaccurately*, as having no doctrine, it will never take its rightful place in the academy and therefore never *fulfill its potential to benefit students*." *Id.* at 17–18 (emphasis added).

43. Jewel, *supra* note 42, at 50 ("Substance and skill necessarily merge together in any legal writing class."). Jewel explained that the substance/skills divide was, in part, a historical consequence of the professionalization process:

> At the turn of the century, elite law professors . . . sought to cement their legal education model as the *only* acceptable credential for entry into the profession. This effort meant that the Harvard-style law professor had to distance himself from members of the practicing bar and practice-oriented teachers who held the keys to other credentialing models . . . . As a result of this tension, elite law professors developed a professional identity emphasizing expertise in substantive law scholarship and theory, but denigrating law practice.

Id. at 60–61.

writing courses often cover topics once addressed in venerated legal methods courses,[44] including jurisprudence which has been "traditionally categorized as an intellectual and theoretical subject existing on a higher plane than legal writing, [but which] is actually intimately connected with the process of legal writing."[45] Finally, the argument that a distinction between casebook courses and legal writing courses justifies discriminatory treatment of legal writing faculty members is further undermined by the fact that many legal writing faculty members teach casebook courses in addition to teaching legal writing.[46]

IV. Consequences of Institutional Discrimination Against Female Contractual Faculty Members

It is painfully clear that, notwithstanding a significant amount of scholarship that acknowledges and addresses this problem,[47] "legal education has a back of the bus, and it is legal

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44. *See id.* at 61–63 ("We routinely cover the intellectual and analytical material covered by the old legal method courses.").

45. *Id.* at 63.

46. ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., *supra* note 3, at 83 (question 83). In sum, to the extent that legal writing faculty members have credentials and qualifications that mirror those of the casebook faculty members at their institutions, their security of position should be equitable. This should occur particularly where the legal writing professors have satisfied standards for promotion and retention similar to those of their casebook peers. Ann C. McGinley, *Discrimination in Our Midst: Law Schools' Potential Liability for Employment Practices*, 14 UCLA WOMEN'S L.J. 1, 56–57 (2005) [hereinafter McGinley, *Discrimination in Our Midst*] ("[L]aw schools should work to equalize the positions of contract and tenure-track faculty . . . [and] abolish the faculty policies and/or practices that create artificial barriers for women who seek tenure-track positions."). In terms of evaluating faculty on their individual merits rather than with respect to the courses they teach, McGinley argued that law faculty

> should consider carefully and seriously the qualities and qualifications necessary to a law faculty member on the tenure track and be prepared to justify their hiring preferences and standards. They should also consider carefully the qualities and qualifications necessary to a law faculty member who is hired into a contract position, *consciously challenging the gendered assumptions resting in many of the presumed qualifications.*

Id. at 57 (emphasis added).

47. *See, e.g.*, Stanchi, *supra* note 41, at 468 ("This institutionalized status system is based on elitism and gender discrimination. . . . Even more troubling is the way that the hierarchy is gender segregated, with women at the bottom and men at the top. Anytime a substantial cluster of women hold low-pay, low-status jobs, feminist and humanist alarms should ring."); *see also* Peter Brandon Bayer, *A Plea for Rationality and Decency: The Disparate Treatment of Legal Writing Faculties as a Violation of Both Equal Protection and Professional Ethics*, 39 DUQ. L. REV. 329, 353 (2001) ("Among all full-time members of law school faculties, only legal writing teachers are subjected to systemic and persistent inequality ranging from remarkably disadvantageous terms of employment to disdain and segregation within their own law school societies. With the endorsement, if not outright encouragement, of the American Bar Association . . . , most law schools impose on

writing."[48] The discriminatory treatment of legal writing faculty members not only impacts female members of the academy, but also undermines *student* success in several important ways. First, if the security of position of contractual faculty members is not adequately protected, students may have access to fewer skills professors during a time when they need more one-on-one guidance than ever.[49] It has been widely reported that, with declining enrollments, many schools have lowered the academic credentials of incoming students.[50] Moreover, recent criticism of legal education has focused on the need for more skills training.[51] The ABA Task Force on the Future of Legal Education noted in its most recent recommendations that

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legal writing professors a wide assortment of conditions distinctly and deliberately less desirable than those enjoyed by other full-time law teachers."); McGinley, *Discrimination in Our Midst*, *supra* note 46, at 11 ("While it is unclear whether the legal writing jobs are lower paid and lower status because they are predominantly occupied by women or whether women are hired into these jobs because the jobs themselves are of lower status, or whether both of these propositions are true, years after the application of the Civil Rights Act to educational institutions, law schools have created a segregated, unequal society in which women are clustered in the lower status, lower paying jobs, and men occupy the more prestigious, more highly paid positions."); McGinley, *Reproducing Gender*, *supra* note 40, at 128 ("Faculty members who are not hired onto the tenure track are usually clinical, library, legal writing, or academic support faculty. These jobs suffer from lower status, are occupied predominately by women, pay less, and are gendered female."); Robbins, *supra* note 40, at 110 ("Given the increasing importance of legal research and writing to law students, how do we explain this ongoing disparity? At a minimum, the disparity reflects gender discrimination, pure and simple."); Stanchi & Levine, *supra* note 14, at 4 ("Unlike any law firm or corporation, the legal academy has an explicit and *de jure* two-track system for its lawyers: a high-status, high-pay professorial track made up overwhelmingly of men, and a low-status, low-pay 'instructor' track made up overwhelmingly of women.").

48. John A. Lynch, Jr., *Teaching Legal Writing After a Thirty-Year Respite: No Country for Old Men?*, 38 CAP. U. L. REV. 1, 15 (2009) ("The inference of gender animosity in the treatment of legal writing teachers is even stronger in light of unequal treatment of women faculty in legal education generally and, remarkably, superior treatment of men *within* the legal writing community.").

49. *See, e.g.*, ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., QUALITY LEGAL WRITING INSTRUCTION AND ABA ACCREDITATION STANDARD 405: REPORT AND RECOMMENDATIONS 7 (2001) ("A legal writing program is effective only if directors and teachers are provided with adequate job security. A school cannot provide quality or success in any instructional activity unless it guarantees continuity, professionalism, and resources for those who administer and teach.").

50. *See, e.g.*, Ryan Calo, *Why Now Is a Good Time To Apply to Law School*, FORBES (Nov. 24, 2013, 1:43 AM), http://www.forbes.com/sites/ryancalo/2013/11/24/why-now-is-a-good-time-to-apply-to-law-school/ ("[S]chools are competing feverishly for good students. An applicant who, a few years ago, would have been waitlisted at a top twenty school, may now find herself with a scholarship.").

51. *See* TASK FORCE ON THE FUTURE OF LEGAL EDUC., AM. BAR ASS'N, REPORT AND RECOMMENDATIONS 3 (2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf.

> [t]he calls for more attention to skills training, experiential learning, and the development of practice-related competencies have been heard and many law schools have expanded practice-preparation opportunities for students. Yet, there is need to do much more. The balance between doctrinal instruction and focused preparation for the delivery of legal services needs to shift still further toward developing the competencies and professionalism required of people who will deliver services to clients.[52]

Given the academy's acknowledged emphasis on skills instruction, and the fact that incoming students may warrant more focused instruction on the foundational skills introduced in a legal writing course, it would be difficult to justify dilution of legal writing faculties based on educational considerations as required by the AAUP Standards.[53]

The second potential consequence of failing to protect female 405(c) faculty members is that students have fewer female faculty-member role models. Citing the ABA Commission on Women in the Profession, one commentator noted that "[g]ender bias that affects women students or faculty, at best, starts young male and female lawyers off on the wrong foot and at worst, fails to provide them with the tools they will need to overcome the barriers they will likely encounter during their careers."[54] Another author observed that, when law courses become gendered, and female faculty members dominate particular courses, students suffer: "If the female faculty is primarily teaching less prestigious courses, the role model they present to female students may be a discouraging one."[55] Such situations influence student perception and "may narrow female student's and lawyer's aspirations for future careers, and possibly confirm their suspicion that women do not succeed in certain types of practices."[56]

The consequences of providing legal writing faculty members with sub-standard employment conditions make it even less desirable for female faculty members of color, which further dilutes the pool of diverse female role models for students.[57] As

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52. *Id.*

53. *See supra* Part II.

54. Lynch, *supra* note 48, at 16 (citing COMM'N ON WOMEN IN THE PROFESSION, AM. BAR ASS'N, ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION 3–4 (1996)); *see also id.* ("[L]aw schools have a responsibility to encourage their students to respect the law and to behave in a manner that encourages others to do so.").

55. Kornhauser, *supra* note 6, at 326.

56. *Id.* ("[W]omen teaching less prestigious areas of the law may help perpetuate the over-representation of women practicing in those areas.").

57. *See* McMurty-Chubb, *supra* note 16, at 56 ("Simply, a teacher who is a

Teri McMurtry-Chubb explained:

> Legal writing, at its essence, is about teaching students to "think like lawyers." This process necessarily involves teaching students how to approach a problem from various perspectives, but within the limited structure of distinguishing legal facts and issues from non-legal ones through a formal and logical reasoning process devoid of emotion and partiality.[58]

For female faculty members of color, however, "[t]he structure and racial composition of [Legal Research and Writing (LRW)] programs makes it more likely that LRW faculty will not problematize the process by which lawyers and jurists analyze and reason."[59] Further,

> [i]f LRW programs continue to be structured in a manner that makes them the less desirable choice in the academy for people of color, students will lose access to these diverse perspectives—these different ways of knowing and experiencing the world. Without knowledge of these experiences, students will absorb the process by which legal institutions protect [W]hite privilege and power without consciousness of this process as such. Accordingly, they will face the danger of forming unexamined assumptions about people of color, rooted in the seemingly objective process of legal reasoning and analysis, which influence their construction and communication of legal arguments as lawyers and jurists.[60]

A final consequence of allowing discriminatory treatment of female 405(c) faculty members is that our students—*students who will become lawyers*—may become desensitized to discriminatory treatment of female members of the profession.[61] As Ann C. McGinley explained, "[b]y our willingness to ignore the structural and economic forces that cause law schools to discriminate against women, we implicitly offer to our graduates and the legal profession the message that sex discrimination in employment is permissible."[62] It is particularly troubling and painful that the academy would allow such desensitization to occur in law school, as students develop their professional identities.[63]

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member of a majority group often lacks the perspective of those outside of their shared experiences as majority group members.").

58. *Id.* at 54.

59. *Id.*

60. *Id.* at 55.

61. *See* Lynch, *supra* note 48, at 16 ("The doctrinal faculty's treatment of the legal writing faculty provides a bad example for law students to do likewise.").

62. McGinley, *Discrimination in Our Midst*, *supra* note 46, at 59.

63. *Id.* at 56 (recommending the equalization of the conditions of employment afforded to tenure and contact faculty members at law schools). McGinley noted:

V. Recommendation: A Watchful Eye

The solution should have been straightforward: amend the ABA Accreditation Standards so that all law faculty members have the same security of position. Substandard conditions of employment are not appropriate when they are "applied only to one cohort of the law professoriate. Application of such a standard is suspicious when the group to which it is applied is overwhelmingly female."[64] This is even more questionable given ABA Standard 211, which prohibits law schools from discrimination based on sex.[65] Unfortunately, the most recent round of modifications to the ABA Accreditation Standards has demonstrated that this relatively uncomplicated solution will not occur.

McGinley has observed that law schools may be liable for the discrimination sanctioned by the standards:

> While there may be complicated reasons for women's concentration at the bottom of the law school faculty hierarchy, the fact is that law school administrators and faculty have looked the other way, ignoring a situation that many find uncomfortable and inequitable. The concentration of women in the lower levels of law faculty hierarchies makes law schools vulnerable ethically and practically.[66]

Notwithstanding, McGinley asserted that "the ghettoization of women lawyers in law schools should not be an intractable problem."[67] Because "legal education has traditionally had the responsibility of leading the way among lawyers, espousing ethical principles that lawyers should follow,"[68] legal educators and administrators should carefully evaluate attempts to interfere with the security of position afforded to contractual faculty members who are predominantly female. This is particularly true because contractual female law professors may not be in a position

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> Reform will not only avoid litigation; it will also permit law schools to serve as an example to corporations, law firms[,] and other entities. Furthermore, it will allow female students, who represent almost half of law school graduates, to expect law firms and corporations where they work to permit them to fulfill their full potential as lawyers and as citizens.

Id.

64. *See* Lynch, *supra* note 48, at 15.

65. *See, e.g.*, *id.* at 16 ("Although it is difficult to reconcile with Standard 405(d), which essentially enables law schools to treat legal writing teachers unequally, ABA Standard 211 requires law schools to embrace equal opportunity, including nondiscrimination based on sex.").

66. McGinley, *Discrimination in Our Midst*, *supra* note 46, at 3.

67. *Id.* at 56 ("[L]aw schools should work to equalize the positions of contract and tenure-track faculty.").

68. *Id.* at 59.

to challenge an institution that ignores tenure-like processes for dismissal. Earning a presumptively renewable contract provides faculty members with rights, but rights that have not been well defined or tested.[69] This makes the Standards inadequate in practice if they are not properly monitored and enforced. To the extent, therefore, that discriminatory treatment facilitated by the Standards exists, institutional attempts to undermine or ignore the modest protections afforded by the Standards should be closely scrutinized and prohibited. Specifically, attempts by law schools to target legal writing faculty members for termination—especially in an environment where incoming law students need one-on-one instruction[70]—should be closely evaluated to determine whether such attempts comport with a form of tenure-like security.[71]

Conclusion

The Standards and statistics demonstrate that "the predominantly female legal writing cohort endures 'a version of gender discrimination that no law firm or corporation would dare institutionalize or rationalize, let alone put into print.'"[72] Confronting this form of discrimination is difficult and frightening.[73] However, if institutions are allowed to disregard or minimize the job security protections afforded to predominately female contractual faculty members, the marginalization of and discrimination against women will increase to the detriment of the academy, its students, and the profession.

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69. *See supra* Part I.

70. Kristen Konrad Tiscione, *A Writing Revolution: Using Legal Writing's "Hobble" To Solve Legal Education's Problem*, 42 CAP. U. L. REV. 143, 152 (2014) (outlining the declining research and writing skills of incoming law students). Tiscione noted that "[t]eaching law graduates to be competent, professional writers may become more difficult because matriculating law students have less writing experience and, perhaps, weaker research, reading comprehension, critical-thinking, and writing skills than in the past." *Id.*

71. *See* McGinley, *Discrimination in Our Midst*, *supra* note 46, at 4.

72. Lynch, *supra* note 48, at 13 (citing Stanchi & Levine, *supra* note 14, at 4).

73. Robbins, *supra* note 40, at 128 ("Political struggles such as these are painful, frightening, and isolating. That alone has prevented most of us from speaking out against what we know to be unfair.").